

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

10 MARIN ALLIANCE FOR MEDICAL  
11 MARIJUANA, a not-for-profit association;  
12 JOHN D'AMATO, an individual,  
13 MEDTHRIVE, INC., a not-for-profit  
cooperative corporation doing business as  
14 MedThrive Cooperative; THE JANE  
PLOTITSA SHELTER TRUST, a revocable  
15 living trust; THE FELM TRUST, an  
irrevocable living trust; and THE DIVINITY  
TREE PATIENTS' WELLNESS  
COOPERATIVE, INC., a not-for-profit  
cooperative corporation,

16 Plaintiffs,  
vs.

17 ERIC HOLDER, Attorney General of the  
18 United States; MICHELLE LEONHART,  
19 Administrator of the Drug Enforcement  
Administration; HON. MELINDA HAAG,  
20 U.S. Attorney for the Northern District of  
California,

21 Defendants.

Case No: C 11-05349 SBA

**ORDER GRANTING MOTION  
TO DISMISS AND DENYING  
AMENDED MOTION FOR A  
TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY  
INJUNCTION**

Docket 23, 38.

Three medical marijuana dispensaries, one of their landlords and a medical marijuana patient ("Plaintiffs") brought the instant action to challenge recent threats by the United States Department of Justice to take legal action against landlords of medical marijuana dispensaries in the Northern District of California. The parties are presently before the Court on Defendants' motion to dismiss and Plaintiffs' amended motion for a temporary restraining order ("TRO") and preliminary injunction. Dkt. 23, 38. Having read

1 and considered the papers filed in connection with these matters and being fully informed,  
 2 the Court hereby GRANTS Defendants' motion to dismiss and DENIES Plaintiffs' amended  
 3 motion for a TRO and preliminary injunction, for the reasons stated below. The Court, in  
 4 its discretion, finds these matters suitable for resolution without oral argument. See Fed.R.  
 5 Civ.P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

6 **I. BACKGROUND**

7 **A. Statutory Overview**

8 The instant action arises from the tension that exists between federal and California  
 9 laws governing marijuana use. These distinct statutory frameworks are briefly summarized  
 10 below.

11 **1. The Federal Controlled Substances Act**

12 After taking office in 1969, President Nixon declared a national "war on drugs."  
 13 Gonzales v. Raich, 545 U.S. 1, 10 (2005) [hereinafter "Raich I"]. Shortly thereafter,  
 14 Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970, also  
 15 known as the Controlled Substances Act ("the Act" or "CSA"). Pub. L. No. 91-513, 84  
 16 Stat. 1236. "Enacted in 1970 with the main objectives of combating drug abuse and  
 17 controlling the legitimate and illegitimate traffic in controlled substances, the CSA creates a  
 18 comprehensive, closed regulatory regime criminalizing the unauthorized manufacture,  
 19 distribution, dispensing, and possession of substances classified in any of the Act's five  
 20 schedules." Gonzales v. Oregon, 546 U.S. 243, 250 (2006). The CSA places substances in  
 21 one of five classifications or schedules, see 21 U.S.C. § 812, "based on their potential for  
 22 abuse or dependence, their accepted medical use, and their accepted safety for use under  
 23 medical supervision," Gonzales, 546 U.S. at 250. Substances listed in Schedule I are the  
 24 most restricted in terms of access and use, while those in Schedule V are the least restricted.  
 25 Id. In enacting the CSA, "Congress was particularly concerned with the need to prevent the  
 26 diversion of drugs from legitimate to illicit channels." Raich I, 545 U.S. at 12-13.

27 Marijuana is classified as a Schedule I substance under the Act, and therefore is  
 28 subject to the most restrictions. See 21 U.S.C. § 812(c). Although substances on Schedules

1 II through V may be dispensed and prescribed for medical use, "[S]chedule I drugs cannot  
 2 be dispensed under a prescription." United States v. Oakland Cannabis Buyers' Co-op., 532  
 3 U.S. 483, 492 n. 5 (2001) [hereinafter "Oakland Cannabis"]. The inclusion of marijuana on  
 4 Schedule I reflects the federal government's determination that "marijuana has 'no currently  
 5 accepted medical use' at all." Id. As such, the federal CSA makes it illegal to manufacture,  
 6 distribute, or possess marijuana. 21 U.S.C. §§ 841, 844. Further, it is illegal under the  
 7 CSA to open, use, lease or maintain any place for the purpose of manufacturing,  
 8 distributing, or using any controlled substance. Id. § 856(a)(1). The only exception to  
 9 these prohibitions is the possession and use of marijuana in federally-approved research  
 10 projects. Id. § 823(f).

## 11           **2. California's Compassionate Use Act**

12       In contrast to the federal law, California law expressly authorizes the use of  
 13 marijuana for medical purposes. In 1996, California voters passed Proposition 215, known  
 14 as the Compassionate Use Act of 1996, which permits seriously ill patients to obtain  
 15 medical marijuana upon written or oral recommendation of a physician. See Cal. Health &  
 16 Safety Code § 11362.5. The Compassionate Use Act provides, in part:

17       (b)(1) The people of the State of California hereby find and  
 18 declare that the purposes of the Compassionate Use Act of 1996  
 are as follows:

19       (A) To ensure that seriously ill Californians have the right to  
 20 obtain and use marijuana for medical purposes where that  
 21 medical use is deemed appropriate and has been recommended  
 22 by a physician who has determined that the person's health  
 would benefit from the use of marijuana in the treatment of  
 cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma,  
 arthritis, migraine, or any other illness for which marijuana  
 provides relief.

23       (B) To ensure that patients and their primary caregivers who  
 24 obtain and use marijuana for medical purposes upon the  
 25 recommendation of a physician are not subject to criminal  
 prosecution or sanction.

26       (C) To encourage the federal and state governments to  
 27 implement a plan to provide for the safe and affordable  
 distribution of marijuana to all patients in medical need of  
 marijuana.

1 Cal. Health & Safety Code § 11362.5(b)(1)(A)-(C). In 2003, the California legislature  
 2 added the Medical Marijuana Program, *id.* §§ 11362.7-11362.83, to "address issues not  
 3 included in the CUA [i.e., Compassionate Use Act] so as to promote the fair and orderly  
 4 implementation of the CUA." *People v. Wright*, 40 Cal. 4th 81, 85 (2006).

5 **B. Legal Developments**

6 The conflict between the federal CSA and California's Compassionate Use Act with  
 7 respect to the issue of medical marijuana has spawned several Supreme Court and Ninth  
 8 Circuit decisions, as well as other litigation. These decisions are controlling with respect to  
 9 most of the claims alleged in the Amended Complaint filed in this action. These cases are  
 10 summarized below.

11 **1. Oakland Cannabis**

12 In January 1998, the United States brought an action under the CSA in the Northern  
 13 District of California against the Oakland Cannabis Cultivators Club ("the cooperative")  
 14 and its executive director seeking to enjoin them from distributing and manufacturing  
 15 marijuana. *Oakland Cannabis*, 532 U.S. at 487. Judge Charles Breyer granted the  
 16 government's motion for preliminary injunction, and later denied the cooperative's motion  
 17 to modify the injunction to allow for the distribution of "medically necessary" marijuana.  
 18 *Id.* The cooperative appealed, and the Ninth Circuit reversed and remanded the ruling on  
 19 the motion to modify the injunction. *Id.* at 488. The Ninth Circuit held that medical  
 20 necessity was a legally cognizable defense and the district court had mistakenly believed it  
 21 possessed no discretion to issue an injunction more limited in scope than the CSA. *Id.* In  
 22 addition, the Ninth Circuit found that the district court should have weighed the public  
 23 interest and considered factors such as the serious harm in depriving patients of marijuana  
 24 in deciding whether to modify the injunction. *Id.*

25 The Supreme Court reversed the decision of the Ninth Circuit, holding that there is  
 26 no medical necessity exception to the CSA's prohibitions on manufacturing and distributing  
 27 marijuana. *Oakland Cannabis*, 532 U.S. at 490. In reaching its decision, the Court  
 28 explained that a necessity defense is inapt where the legislature has made a "determination

1 of values." Id. With respect to the value of medical marijuana, the Court explained that  
2 Congress, in enacting the CSA, had made a legislative determination that "marijuana has no  
3 medical benefits worthy of an exception (outside the confines of a government-approved  
4 research project)." Id. at 491. While some drugs may be dispensed for medical use, the  
5 same is not true for marijuana, which, for purposes of the CSA, has "no currently accepted  
6 medical use at all." Id. (internal quotations omitted). Additionally, the Court held that the  
7 Ninth Circuit erred in instructing the district court to consider "any and all factors that  
8 might relate to the public interest or the conveniences of the parties, including the medical  
9 needs of the cooperative's patients" because "[c]ourts of equity cannot, in their discretion,  
10 reject the balance that Congress has struck in the [CSA]." Id. at 497-498.

11           **2.       Raich I**

12          Four years after rendering its decision in Oakland Cannabis, the Supreme Court  
13 again addressed the interplay between the Compassionate Use Act and the CSA in  
14 Gonzales v. Raich, another case originating from this District. In that case, plaintiffs-  
15 respondents—two California residents who, in accordance with their physician's  
16 recommendations used marijuana for serious medical conditions—sought injunctive and  
17 declaratory relief prohibiting enforcement of the CSA to the extent that it prevented them  
18 from possessing, obtaining, or manufacturing marijuana for their personal medical use.  
19 Raich I, 545 U.S. at 7-8. They alleged that the CSA's categorical prohibition against the  
20 manufacture and possession of marijuana as applied to the intrastate manufacture and  
21 possession of marijuana for medical purposes under California law exceeded Congress'  
22 authority under the Commerce Clause. Id. at 8. Judge Martin Jenkins denied the  
23 respondents' motion for preliminary injunction. Id. On appeal, the Ninth Circuit reversed  
24 and ordered the district court to enter the requested injunction on the grounds that  
25 respondents had demonstrated a strong likelihood of success on their claim that, as applied  
26 to them, the CSA is an unconstitutional exercise of Congress' Commerce Clause authority.  
27 Id.  
28

1       The Supreme Court reversed the Ninth Circuit and held that the legislature's  
 2 authority under the Commerce Clause includes the power to prohibit local cultivation and  
 3 use of marijuana. Raich I, 545 U.S. at 9. The Court reasoned that the CSA was within  
 4 Congress' Commerce Clause power because production of marijuana, even if limited to  
 5 home consumption, "has a substantial effect on the supply and demand in the national  
 6 market for that commodity." Id. at 19. In the Supreme Court's view, the exemptions  
 7 permitting marijuana use under the Compassionate Use Act "will have a significant impact  
 8 on both the supply and demand sides of the market for marijuana," since they provide  
 9 physicians with an economic incentive to grant their patients permission to use the drug  
 10 which, in turn, "can only increase the supply of marijuana in the California market." Id. at  
 11 31. The Court remanded the case to the Ninth Circuit for further proceedings consistent  
 12 with its opinion. Id. at 33.

13                   **3.       Raich II**

14       Following remand from the Supreme Court, plaintiff Raich renewed her claims  
 15 based on common law necessity, fundamental rights protected by the Fifth and Ninth  
 16 Amendments, and rights reserved to the states under the Tenth Amendment. Raich v.  
 17 Gonzales, 500 F.3d. 850, 857 (9th Cir. 2007) [hereinafter "Raich II"].<sup>1</sup> The court  
 18 concluded that Raich had failed to meet her burden of establishing a likelihood of success  
 19 on these claims, and affirmed the district court's denial of her motion for preliminary  
 20 injunction. Id.

21       In her common law necessity claim, Raich argued that the federal government was  
 22 precluded from enforcing the CSA against her because she faced a Hobson's choice of  
 23 either complying with the CSA and enduring excruciating pain and possibly death—or  
 24 violating its provisions by using marijuana. Raich II, 500 F.3d at 858. While  
 25 acknowledging that Raich had understandably chosen "the lesser evil" of using marijuana  
 26

---

27                   <sup>1</sup> In its initial decision, the Ninth Circuit did not reach any issues beyond the  
 28 Commerce Clause. Raich II, 500 F.3d at 856. On remand, the court considered the  
 remaining arguments relating to the motion for preliminary injunction. Id.

1 and had otherwise satisfied the factual predicate for a necessity defense, the court  
 2 questioned whether such a defense remained legally viable after the Supreme Court's  
 3 decision in Oakland Cannabis. Id. at 859-60. Consequently, the court concluded that  
 4 Raich's necessity claim "is best resolved within the context of a specific prosecution under  
 5 the [CSA]," as opposed to a civil action seeking to enjoin enforcement of the CSA. Id. at  
 6 860.

7 Next, the court considered Raich's claim for substantive due process under the Fifth  
 8 Amendment, which states that "[n]o person shall . . . be deprived of life, liberty, or  
 9 property, without due process of law[.]" U.S. Const. amend. V. Citing the two-step  
 10 approach enunciated in Washington v. Glucksberg, 521 U.S. 702, 719 (1997), the Raich II  
 11 court considered (1) whether the "right is deeply rooted in this nation's history and  
 12 traditions implicit in the concept of ordered liberty," and (2) "the description of the asserted  
 13 fundamental right." Raich II, 500 F.3d at 862-863. Considering the second step first, the  
 14 court found that it was constrained under Supreme Court precedent to "narrowly" identify  
 15 the right at stake. Id. at 864. Though Raich broadly described her right as one to "make  
 16 life-shaping medical decisions that are necessary to preserve the integrity of her body,  
 17 avoid intolerable physical pain, and preserve her life," the court concluded that Raich's  
 18 asserted right was more accurately characterized as "the right to use marijuana to preserve  
 19 bodily integrity, avoid pain and preserve her life." Id. at 864 (emphasis in original).

20 The court then considered the question of whether Raich's asserted right was one  
 21 that was deeply rooted in United States' history and tradition and implicit in the concept of  
 22 ordered liberty. Raich II, 500 F.3d at 864. To answer that question, the court looked to the  
 23 Supreme Court's landmark decision in Lawrence v. Texas, 539 U.S. 558 (2003), which  
 24 involved a challenge to a Texas state law that criminalized sodomy between consenting,  
 25 adult homosexuals. Id. at 562-563; Raich II, 530 F.3d at 865-866. Prior to Lawrence, the  
 26 Supreme Court had upheld Georgia's then-applicable sodomy statute, holding that there  
 27 was no constitutionally protected right for "homosexuals to engage in acts of consensual  
 28 sodomy." Bowers v. Hardwick, 478 U.S. 186, 192 (1986). The Lawrence court, however,

1 observed that even if a particular interest has not been deemed as fundamental in the past,  
 2 "an emerging awareness" of a liberty interest in modern times may require protection of an  
 3 asserted right. Lawrence, 539 U.S. at 572. The Court then pointed out that of the twenty-  
 4 five states that had laws criminalizing sodomy when it decided Bowers, only thirteen still  
 5 had such laws and a mere four enforced their laws only against homosexual conduct. Id. at  
 6 573. In those states that maintained sodomy laws, "there [was] a pattern of nonenforcement  
 7 with respect to consenting adults acting in private." Id.

8 Raich argued that over the course of the last decade, there has been an "emerging  
 9 awareness of marijuana's medical value," as evidenced by the growing number of states that  
 10 have passed laws permitting the use of marijuana for medical reasons. Raich II, 500 F.3d at  
 11 865. The Ninth Circuit recognized the potential viability of Raich's argument, but  
 12 ultimately found that the right to use medical marijuana had not yet reached the point of  
 13 being "fundamental" and "implicit in the concept of ordered liberty." Id. at 866. While  
 14 acknowledging that since 1996 medical marijuana has been legalized in eleven states, the  
 15 court concluded that medical marijuana use had not "obtained the degree of recognition  
 16 today that private sexual conduct had obtained by 2004 in Lawrence." Id. at 865. The  
 17 Raich II court did note, however, that medical marijuana may attain similar status "sooner  
 18 than expected." Id. at 866.

19 Finally, the court addressed Raich's claim that the CSA infringes upon the State of  
 20 California's police powers, as conferred by the Tenth Amendment. Raich II, 500 F.3d at  
 21 866.<sup>2</sup> The Ninth Circuit agreed that the Compassionate Use Act is "aimed at providing for  
 22 the health of the state's citizens [and] appears to fall squarely within the general rubric of  
 23 the state's police powers"; nonetheless, the Court rejected Raich's contention that the CSA  
 24 contravened the Tenth Amendment. Id. at 867. The court found that "after Gonzales v.  
 25 Raich, it would seem that there can be no Tenth Amendment violation in this case," and for  
 26

---

27       <sup>2</sup> The Tenth Amendment states in its entirety as follows: "The powers not delegated  
 28 to the United States by the Constitution, nor prohibited by it to the States, are reserved to  
 the States respectively, or to the people." U.S. Const. amend. X.

1 that reason, concluded that "Raich [had] failed to demonstrate a likelihood of success on  
 2 her claim that the [CSA] violates the Tenth Amendment." Id.

3           **4.       The Santa Cruz Lawsuit**

4           During the pendency of the district court proceedings in Raich v. Ashcroft, N.D. Cal.  
 5 No. C 02-4872 MJJ, the County of Santa Cruz and others filed suit in this Court seeking to  
 6 enjoin various federal government defendants from conducting further raids or seizures  
 7 against Plaintiff Wo/Men's Alliance for Medical Marijuana ("WAMM") and its member-  
 8 patients, and from conducting raids or seizures against patients using marijuana for  
 9 medicinal purposes in compliance with California's Compassionate Use Act within the City  
 10 and County of Santa Cruz. County of Santa Cruz v. Aschcroft, No. C 03-1802 JF  
 11 [hereinafter "Santa Cruz"]. On January 25, 2010, the parties filed a Joint Stipulation of  
 12 Dismissal Without Prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii). Am.  
 13 Compl. Ex. 5 at 4-6, Dkt. 21-5. The stipulation states that "[a]s a result of the issuance of  
 14 the Medical Marijuana Guidance, plaintiffs agree to dismiss the case without prejudice."  
 15 Id.

16           The "Medical Marijuana Guidance" attached to the stipulation is a memorandum  
 17 from the United States Department of Justice ("DOJ"), dated October 19, 2009, prepared by  
 18 then Deputy Attorney General David Ogden (the "Ogden memo"). The purpose of the  
 19 Ogden memo, which is addressed to "SELECTED UNITED STATES ATTORNEYS," is  
 20 to provide "clarification and guidance to federal prosecutors in States that have enacted  
 21 laws authorizing the medical use of marijuana." Id. In pertinent part, the DOJ advises that:

22           The prosecution of significant drug traffickers of illegal drugs,  
 23 including marijuana, and the disruption of illegal drug  
 24 manufacturing and trafficking networks, continues to be a core  
 25 priority of the Department's efforts against narcotics and  
 26 dangerous drugs, and the Department's investigative and  
 27 prosecutorial resources should be directed towards these  
 28 objectives. As a general matter, pursuit of these priorities  
 should not focus federal resources in your States on individuals  
 whose actions are in clear and unambiguous compliance with  
 existing state laws providing for the medical use of marijuana.

1       Id. at 2. The above notwithstanding, the DOJ explicitly states that: "This memorandum  
2 does not alter in any way the Department's authority to enforce federal law . . . [and] does  
3 not 'legalize' marijuana or provide a legal defense to a violation of federal law . . . . Rather,  
4 this memorandum is intended solely as a guide to the exercise of investigative and  
5 prosecutorial discretion." Id.

6              **C.     The Instant Lawsuit**

7       In late September and early October 2011, the United States Attorneys for each of  
8 the four federal districts in California contacted various entities involved in California's  
9 Medical Marijuana program, alleging that marijuana dispensaries, landlords who rent to  
10 dispensaries, patients and other supporting commercial entities are in violation of federal  
11 law. Am. Compl. ¶ 21. By letters dated September 28, 2011, Melinda Haag, the United  
12 States Attorney for the Northern District of California, contacted landlords providing space  
13 to the Marin Alliance for Medical Marijuana ("MAMM"), Medthrive Cooperative  
14 ("Medthrive") and The Divinity Tree, notifying them that medical marijuana dispensaries  
15 are illegal under federal law and that they may be subject to "criminal prosecution,  
16 imprisonment, fines, and forfeiture of assets, including the real property on which the  
17 dispensary is operating." E.g., Am. Compl. Exs. 1-3. The letters (hereinafter "Haag  
18 letters") warn: "Please take necessary steps to discontinue the sale and/or distribution of  
19 marijuana at the above-referenced location within 45 days of this letter." Id.

20       In response to the Haag letters, MAMM and John D'Amato, a medical marijuana  
21 patient, filed suit in this Court on November 4, 2011 seeking to enjoin the Attorney  
22 General, the Administrator of the Drug Enforcement Agency, and the U.S. Attorney for the  
23 Northern District of California (collectively "Defendants") from arresting, prosecuting, or  
24 otherwise seeking sanctions or forfeitures against them and similarly situated medical  
25 marijuana growers and providers who operate in compliance with California state law.  
26 Compl., Dkt. 1. They also seek a declaration that enforcement of the CSA is  
27 unconstitutional to the extent that it prevents Plaintiffs and similarly situated individuals  
28

1 from obtaining medical marijuana with a doctor's recommendation. Id. Four days later on  
 2 November 8, 2011, Plaintiffs filed a motion for a TRO and preliminary injunction. Dkt. 5.<sup>3</sup>

3 On November 11, 2011, Plaintiffs filed an Amended Complaint, adding four  
 4 plaintiffs—two additional dispensaries, Medthrive and The Divinity Tree, and Medthrive's  
 5 landlords, the Jane Plotitsa Shelter Trust and the Felm Trust. Am. Compl. ¶¶ 9-12.<sup>4</sup> Like  
 6 the original Complaint, the Amended Complaint alleges six claims for relief: (1) judicial  
 7 estoppel, (2) equitable estoppel, (3) violation of the Ninth Amendment, (4) violation of the  
 8 Tenth Amendment, (5) violation of the Equal Protection Clause of the Fourteenth  
 9 Amendment, and (6) violation of the Commerce Clause. Id. ¶¶ 24-52. Along with their  
 10 Amended Complaint, Plaintiffs filed an amended motion for a TRO and preliminary  
 11 injunction. Dkt. 23. On November 28, 2011, the Court issued an order denying Plaintiff's  
 12 motion for a TRO. Dkt. 34.

13 On January 10, 2012, the Defendants filed a motion to dismiss and an opposition to  
 14 Plaintiffs' amended motion for a TRO and preliminary injunction. Dkt. 38. On January 24,  
 15 2012, Plaintiffs filed a reply to the amended motion for a TRO and preliminary injunction  
 16 and an opposition to the motion to dismiss. Dkt. 40. The Defendants filed a reply to the  
 17 motion to dismiss on January 31, 2012. Dkt. 44.

18 **II. LEGAL STANDARD**

19 A complaint may be dismissed under Rule 12(b)(6) for failure to state a claim if the  
 20 plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support

---

21 <sup>3</sup> On the same date that Plaintiffs filed this action, their counsel filed three virtually  
 22 identical actions on behalf of different entities and individuals in the Eastern, Southern and  
 23 Central Districts of California. See Sacramento Non-Profit Collective v. Holder, E.D. Cal.  
 24 No. C 11-2939 GEB; Conejo Wellness Cntr. Coop. v. Holder, C.D. Cal. No. C 11-9200  
 DMG; Alternative Cnty. Health Care v. Holder, S.D. Cal. No. C 11-2585 DMS.

25 <sup>4</sup> The Court also notes that at least one of the named Plaintiffs in this suit appears to  
 26 be foreclosed from obtaining the requested relief in light of a previous order from Judge  
 27 Breyer of this Court permanently enjoining the MAMM "from engaging in the distribution  
 28 of marijuana, the possession of marijuana with the intent to distribute, or the manufacture  
 of marijuana with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1)." See Opp'n  
 Ex. A, Dkt. 31-1; see also Wash. Mut. Inc. v. United States, 636 F.3d 1207, 1216 (9th Cir.  
 2011) ("Collateral estoppel, or issue preclusion, bars the relitigation of both issues of law  
 and issues of fact actually adjudicated in previous litigation between the same parties.").

1 a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
 2 1990). In determining whether a complaint states a claim on which relief may be granted,  
 3 the Court "accept[s] as true all well-pleaded allegations of material fact, and construe[s]  
 4 them in the light most favorable to the non-moving party." Daniels–Hall v. National Educ.  
 5 Ass'n, 629 F.3d 992, 998 (9th Cir. 2010).

6 However, the Court is not required to accept as true "allegations that are merely  
 7 conclusory, unwarranted deductions of fact, or unreasonable inferences." In re Gilead  
 8 Sciences Securities Litigation, 536 F.3d 1049, 1055 (9th Cir. 2008). The complaint is  
 9 properly dismissed if it fails to plead "enough facts to state a claim to relief that is plausible  
 10 on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim is plausible  
 11 on its face "when the plaintiff pleads factual content that allows the court to draw the  
 12 reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v.  
 13 Iqbal, 129 S.Ct. 1937, 1949 (2009). Thus, "for a complaint to survive a motion to dismiss,  
 14 the non-conclusory 'factual content,' and reasonable inferences from that content, must be  
 15 plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Serv.,  
 16 572 F.3d 962, 969 (9th Cir. 2009).

17 As a general rule, courts may not consider any material beyond the pleadings in  
 18 ruling on a Rule 12(b)(6) motion. U.S. v. Corinthian Colleges, 655 F.3d 984, 998-999 (9th  
 19 Cir. 2011). However, courts "may consider materials that are submitted with and attached  
 20 to the complaint," as well as "unattached evidence on which the complaint 'necessarily  
 21 relies' if: (1) the complaint refers to the document; (2) the document is central to the  
 22 plaintiff's claim; and (3) no party questions the authenticity of the document." Id. at 999.  
 23 Pursuant to Federal Rule of Evidence 201, courts may also take judicial notice of matters of  
 24 public record. Id.

25 Where a complaint or claim is dismissed, leave to amend generally is granted, unless  
 26 further amendment would be futile. See Chaset v. Fleer/Skybox Int'l, 300 F.3d 1083, 1087-  
 27 1088 (9th Cir. 2002); see also Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (if a  
 28

1 court dismisses the complaint, it should grant leave to amend, unless it determines that the  
2 pleading could not possibly be cured by the allegation of other facts).

3 **III. DISCUSSION**

4 Defendants move to dismiss the Amended Complaint on the ground that Plaintiffs  
5 have failed to state a cognizable claim for relief. The cognizability of the claims alleged in  
6 the Amended Complaint is discussed below.

7 **A. Plaintiffs' Request for Judicial Notice**

8 A court may judicially notice a fact that is not subject to reasonable dispute because  
9 it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be  
10 accurately and readily determined from sources whose accuracy cannot reasonably be  
11 questioned. Fed.R.Evid. 201(b).

12 In connection with their opposition to Defendants' motion to dismiss, Plaintiffs  
13 request that the Court take judicial notice of ten documents identified by Plaintiffs as  
14 follows: (1) "January 25, 2010 Joint Stipulation of Dismissal Without Prejudice in County  
15 of Santa Cruz v. Eric H. Holder, Jr. et al. ('Santa Cruz'), United States District Court for the  
16 Northern District of California action no. 03-1802 JF, with exhibit (October 19, 2009  
17 Ogden memo)"; (2) "Transcript of October 30, 2009 Status Conference in Santa Cruz"; (3)  
18 "Declaration of Rick Doblin in Support of Plaintiff's Petition for Temporary Restraining  
19 Order/ Preliminary Injunction, filed in this action as docket number 12 on November 8,  
20 2011"; (4) "November 30, 2011 New York Times article by Michael Cooper titled '2  
21 Governors Asking U.S. to Ease Rules on Marijuana to Allow for its Medical Use,' and  
22 December 1, 2011 Just Say Now article by Jon Walker titled 'VT Gov. Shumlin to Join  
23 Petition to Reschedule Marijuana' "; (5) "July 25, 2010 Associated Press article republished  
24 by the San Francisco Chronicle titled 'Veterans Affairs clinics permit legal marijuana' "; (6)  
25 "Declaration of Paul Armentano in Support of Plaintiff's Petition for Temporary  
26 Restraining Order / Preliminary Injunction (with exhibit)"; (7) "October 8, 2004  
27 Declaration of Lester Grinspoon, M.D., In Support of the Brief of Amici Curiae National  
28 Organization For the Reform of Marijuana Laws (NORML) And the NORML Foundation

1 in Ashcroft v. Raich, United States Supreme Court, Case No. 03-1454"; (8) October 17,  
 2 2011 news release published by the California Medical Association entitled 'CMA urges  
 3 legalization and regulation of medical cannabis to allow for wider clinical research'; (9)  
 4 "October 7, 2003 United States Patent No. 6630507"; and (10) "National Institutes of  
 5 Health / National Institute on Drug Abuse titled 'NIDA InfoFacts: Marijuana,' last edited  
 6 November 2010." Pls.' Request for Judicial Notice ("RJN") Nos. 1-10, Dkt. 41.  
 7 Defendants did not file an opposition to Plaintiffs' RJN.

8 In their request for judicial notice, Plaintiffs' contend, without elaboration or  
 9 analysis, that it is proper for this Court to take judicial notice of all the above-mentioned  
 10 documents under Federal Rule of Evidence 201(b). The Court disagrees. As for the Joint  
 11 Stipulation of Dismissal Without Prejudice filed in the Santa Cruz action and the  
 12 attachment thereto (i.e., the Ogden memo), the Court need not take judicial notice of these  
 13 documents because the Court may consider them as they are attached to the Amended  
 14 Complaint. See Corinthian Colleges, 655 F.3d at 999. As for the transcript of proceedings  
 15 from the October 30, 2009 hearing in the Santa Cruz action, the Court takes judicial notice  
 16 of this document because Plaintiffs' judicial estoppel claim relies on representations made  
 17 by the DOJ at that hearing and no party questions the authenticity of the document. See id.  
 18 As for the remaining documents, i.e., Plaintiffs' RJN Nos. 3-10, Plaintiffs have failed to  
 19 demonstrate that it is proper for the Court to take judicial notice of these documents under  
 20 Rule 201(b). Nor have Plaintiffs argued or shown that the Court may otherwise take  
 21 judicial notice of these documents. See id. (discussing the type of material that courts may  
 22 consider beyond the pleadings in ruling on a Rule 12(b)(6) motion). Accordingly, the  
 23 Court will not consider these documents in ruling on the motion to dismiss.

24 **B. Motion to Dismiss**

25 **1. Judicial Estoppel Claim**

26 Plaintiffs' first claim for relief alleges that Defendants are judicially estopped  
 27 from instituting any legal proceedings against them under the CSA in light of the  
 28

1 stipulation of dismissal and attached Ogden memo filed in the Santa Cruz action. See Am.  
 2 Compl. ¶¶ 24-27. According to Plaintiffs, "the DOJ promised a federal judge that it had  
 3 changed its policy towards the enforcement of its federal drug laws relative to California  
 4 medical cannabis patients." Id. ¶ 25. Plaintiffs claim that under the doctrine of judicial  
 5 estoppel the federal government may not use federal resources to enforce the CSA against  
 6 medical cannabis patients that are in compliance with state law. Id. ¶¶ 25-26.

7 "Judicial estoppel is an equitable doctrine that precludes a party from gaining an  
 8 advantage by asserting one position, and then later seeking an advantage by taking a clearly  
 9 inconsistent position." Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir.  
 10 2001). Application of the doctrine is made on a case-by-case basis and is entrusted to the  
 11 discretion of the court. See Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990). In  
 12 determining whether a party is subject to judicial estoppel, the court considers: "(1) whether  
 13 a party's later position is 'clearly inconsistent' with its original position; (2) whether the  
 14 party has successfully persuaded the court of the earlier position; and (3) whether allowing  
 15 the inconsistent position would allow the party to 'derive an unfair advantage or impose an  
 16 unfair detriment on the opposing party.' " United States v. Liquidators of European Fed.  
 17 Credit Bank, 630 F.3d 1139, 1148 (9th Cir. 2011) (citations omitted).

18 Defendants contend that dismissal of this claim is appropriate because the doctrine  
 19 of judicial estoppel does not apply under the facts of this case. See Defs.' Mot. at 10-12.  
 20 The Court agrees with Defendants. The Court previously considered and rejected Plaintiffs'  
 21 arguments regarding the applicability of the doctrine of judicial estoppel in its November  
 22 28, 2011 Order denying Plaintiffs' motion for TRO. See Nov. 28, 2011 Order at 12-15,  
 23 Dkt. 34. Plaintiffs have not provided any new legal argument demonstrating that the  
 24 doctrine applies under the circumstances of this case. Thus, for the reasons stated in this  
 25 Court's November 28, 2011 Order, id., the Amended Complaint does not state an actionable  
 26 judicial estoppel claim.

27 As set forth more fully in the November 28, 2011 Order, this claim fails because,  
 28 among other things, Plaintiffs have not alleged facts showing that: (1) there is a clear

1 inconsistency between the government's position in the Santa Cruz action and the actions  
2 threatened in the Haag letters<sup>5</sup>; (2) Defendants successfully persuaded the district court in  
3 the Santa Cruz action to dismiss the action based upon any promise to indefinitely forego  
4 enforcement of the CSA against persons or entities involved in the production, sale or use  
5 of medical marijuana; and (3) Defendants gained an unfair advantage by virtue of  
6 submitting the Ogden memo as a basis for the stipulation for dismissal in the Santa Cruz  
7 action. Indeed, as the Court previously stated, since Plaintiffs were not parties to the Santa  
8 Cruz action, it is unclear how Defendants could have obtained any advantage over Plaintiffs  
9 based on their decision to send the Haag letters to the landlords. Moreover, Plaintiffs  
10 overlook that the stipulation for dismissal filed in the Santa Cruz action permitted the  
11 plaintiffs in that action to reinstitute their lawsuit in the event the government declined to  
12 follow the guidance set forth in the Ogden memo. Thus, even if Plaintiffs herein had  
13 standing to assert any prejudice on behalf of the plaintiffs in Santa Cruz, it is clear that any  
14 alleged change in the Defendants' enforcement policy has not conferred an unfair advantage  
15 upon them.

In their opposition brief, Plaintiffs argue that that their judicial estoppel claim is also based on representations made by DOJ attorneys at the October 30, 2009 hearing in the Santa Cruz action, which Plaintiffs assert "are far stronger than the actual language in the [Ogden Memo]." Pls.' Opp. at 8. According to Plaintiffs, the operative complaint "states a plausible claim that the DOJ [attorneys] represented that those in compliance with California state law would neither be prosecuted nor have their property seized as the subject of forfeiture." Id. at 9. A review of the transcript of the October 30, 2009 hearing reveals that the DOJ attorneys did not make any representations regarding the non-enforcement of the CSA beyond what is stated in the Ogden memo. As such, Plaintiffs

<sup>5</sup> As noted in the Court's November 28, 2011 Order, the Ogden memo does not contain a promise not to enforce the CSA. In fact, the memo explicitly states that the DOJ "does not alter in any way [its] authority to enforce federal law[.]" See Am. Compl. Ex. 5 at 3. In short, because the Ogden memo does not contain a promise not to enforce the CSA, Defendants' enforcement of the CSA is not inconsistent with the enforcement policy stated in the Ogden memo.

1 have not stated a cognizable claim for judicial estoppel based on the representations made  
 2 by the DOJ attorneys at the October 30, 2009 hearing in the Santa Cruz action.

3 Accordingly, for the reasons stated above, Defendants' motion to dismiss Plaintiffs'  
 4 judicial estoppel claim is GRANTED. Because amendment would be futile, this claim is  
 5 DISMISSED with prejudice.

6           **2.     Equitable Estoppel Claim**

7       Plaintiffs' second claim is for equitable estoppel—specifically, estoppel by  
 8 entrapment—and avers that they reasonably relied on the Ogden memo as a basis for  
 9 leasing or continuing to lease their properties to medical marijuana operators. Am. Compl.  
 10 ¶¶ 28-32. Defendants contend that dismissal of this claim is appropriate because the  
 11 "estoppel by entrapment" doctrine serves as an affirmative defense in a criminal proceeding  
 12 and thus has no application where, as here, no criminal proceeding has been initiated.  
 13 Defs.' Mot. at 12. In addition, Defendants argue that dismissal is warranted because  
 14 Plaintiffs have not alleged facts demonstrating (1) that an authorized representative of the  
 15 government affirmatively told them that the proscribed conduct was permissible, and (2)  
 16 that they reasonably relied on the government's statement. *Id.*

17       Estoppel by entrapment is a defense in criminal actions wherein a government  
 18 official or agent leads a defendant into criminal conduct by affirmatively misrepresenting  
 19 what is legal. See United States v. Tallmadge, 829 F.2d 767, 773 (9th Cir. 1987). To  
 20 succeed under this theory, the defendant must show "that the government affirmatively told  
 21 him the proscribed conduct was permissible, and that he reasonably relied on the  
 22 government's statement." United States v. Ramirez-Valencia, 202 F.3d 1106, 1109 (9th  
 23 Cir. 2000) (emphasis added).

24       The Court finds that dismissal of this claim is appropriate. First, Plaintiffs have  
 25 failed to oppose Defendants' motion with respect to this claim, which the Court construes as  
 26 Plaintiffs' absence of dispute with Defendants' arguments and an abandonment of the claim.  
 27 See Walsh v. Nev. Dep. of Human Res., 471 F.3d 1033, 1037 (9th Cir. 2006) (failure to  
 28 raise issue in opposition to motion to dismiss). Second, this claim fails on the merits for the

1 reasons stated in the November 28, 2011 Order. See Nov. 28, 2011 Order at 16-17.  
 2 Specifically, the doctrine of equitable estoppel has no application here because this is not a  
 3 criminal proceeding and Plaintiffs are not criminal defendants. Moreover, there is no  
 4 allegation that any criminal proceeding has been initiated against Plaintiffs. Second,  
 5 nothing in the Ogden memo affirmatively informs medical marijuana growers and  
 6 distributors that their conduct is legal. Third, even if the government had affirmatively  
 7 informed Plaintiffs that their conduct was legal—which it clearly did not—any reliance on  
 8 the Ogden memo would be unreasonable. The memorandum was not directed to landlords  
 9 or to the medical marijuana community in general; rather, it was directed to various U.S.  
 10 Attorneys, and not as a statement of official policy, but "solely as a guide to the exercise of  
 11 investigative and prosecutorial discretion." Id.<sup>6</sup> As such, Plaintiffs are hard pressed to  
 12 claim that it was reasonable to rely on a memorandum that was not even addressed to  
 13 them—and which unequivocally did not state that marijuana for medical reasons was  
 14 "legal."

15 Accordingly, Defendants' motion to dismiss Plaintiffs' equitable estoppel claim is  
 16 GRANTED. Because amendment would be futile, this claim is DISMISSED with  
 17 prejudice.

### 18           **3.       Ninth Amendment Claim**

19 Plaintiffs' third claim alleges that Defendants have violated their right to substantive  
 20 due process by threatening to seize their property and pursue civil and criminal sanctions  
 21 against them. Am. Compl. ¶¶ 33-38. The Ninth Amendment, in tandem with the Fifth  
 22 Amendment, protects fundamental rights and liberties "which are, objectively, 'deeply  
 23

---

24           <sup>6</sup> Moreover, once Plaintiffs received the Haag letters, which placed them on notice  
 25 that their actions may violate the CSA and afforded them forty-five days to cease any  
 26 medicinal marijuana-related activities, they were on inquiry notice regarding the legality of  
 27 their conduct. As such, to the extent that Plaintiffs reasonably relied on the Ogden memo,  
 28 such reliance was no longer reasonable after their receipt of the Haag letters. See United  
States v. Weitzenhoff, 35 F.3d 1275, 1290 (9th Cir. 1993) (noting that in order to invoke a  
 defense of estoppel by entrapment, "the defendant must show that he relied on the official's  
 statement and that his reliance was reasonable in that a person sincerely desirous of obeying  
 the law would have accepted the information as true and would not have been put on notice  
 to make further inquiries.").

1 rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,'  
 2 such that 'neither liberty nor justice would exist if they were sacrificed.' " Raich II, 500  
 3 F.3d at 862. Plaintiffs describe the fundamental rights at issue as the "rights to bodily  
 4 integrity that may not be interfered with by the federal government" and "to consult with  
 5 their doctors about their bodies and health." Am. Compl. ¶ 37.

6 In their opposition brief, Plaintiffs argue that they have a fundamental right to use  
 7 cannabis for medical purposes. See Pls.' Opp. at 13-17. According to Plaintiffs, the "future  
 8 day" envisioned in Raich II when society accepts medical marijuana as a fundamental right  
 9 has arrived. See id. at 16-17. Defendants argue that this claim is foreclosed by Raich II's  
 10 holding that, currently, society recognizes no such fundamental right. Defs.' Mot. at 14.  
 11 The Court agrees. Raich II is binding precedent and therefore this claim fails as a matter of  
 12 law. See Raich II, 500 F.3d at 866 ("federal law does not recognize a fundamental right to  
 13 use medical marijuana prescribed by a licensed physician"). Accordingly, Defendants'  
 14 motion to dismiss Plaintiffs' Ninth Amendment claim is GRANTED. Because amendment  
 15 would be futile, this claim is DISMISSED with prejudice.

#### 16           **4. Tenth Amendment Claim**

17 Plaintiffs' fourth claim alleges that Defendants' "threatened actions to raid, arrest,  
 18 prosecute, punish, seize medical cannabis of, forfeit property of, or seek civil or  
 19 administrative sanctions against any Plaintiff" violates California's state police powers in  
 20 contravention of the Tenth Amendment. Am. Compl. ¶ 41. Defendants contend that this  
 21 claim is foreclosed by binding authority. Defs.' Mot. at 17. The Court agrees. This claim  
 22 is legally indistinguishable from the Tenth Amendment claim which the Ninth Circuit  
 23 considered and rejected in Raich II. Raich II, 500 F.3d at 867 (holding that "after [Raich I],  
 24 it would seem that there can be no Tenth Amendment violation in this case."); see also  
 25 United States v. Jones, 231 F.3d 508, 515 (9th Cir. 2000) ("We have held that if Congress  
 26 acts under one of its enumerated powers, there can be no violation of the Tenth  
 27 Amendment.").

28

1           In their opposition brief, Plaintiffs attempt to characterize Raich II's rejection of the  
 2 Tenth Amendment claim as mere dicta. Pls.' Opp. at 17. However, the Court has already  
 3 considered and explicitly rejected this argument as "entirely specious." Nov. 28, 2011  
 4 Order at 20. Accordingly, Defendants' motion to dismiss Plaintiffs' Tenth Amendment  
 5 claim is GRANTED. Because amendment would be futile, this claim is DISMISSED with  
 6 prejudice.

7           **5.       Equal Protection Clause Claim**

8           Plaintiffs' fifth claim alleges that the actions threatened by Defendants in the Haag  
 9 letters violate their right to equal protection. Am. Compl. ¶¶ 44-47. Specifically, they  
 10 complain that Defendants are discriminating against "medical cannabis patients in  
 11 California without a rational basis" because they (1) allow patients in the federal  
 12 government's IND program<sup>7</sup> to receive medical marijuana and (2) have permitted patients  
 13 in Colorado access to medical marijuana through state-licensed distributors. *Id.* ¶ 45.  
 14 Plaintiffs allege that Defendants have no rational basis for "enforcing federal laws  
 15 prohibiting cannabis possession and distribution" in California while simultaneously  
 16 allowing medical marijuana to be used in the IND program and by Colorado patients. *Id.*  
 17 ¶ 46.

18           "[T]he Due Process Clause of the Fifth Amendment subjects the federal government  
 19 to constitutional limitations that are the equivalent of those imposed on the states by the  
 20 Equal Protection Clause of the Fourteenth Amendment." Consejo De Desarrollo  
 21 Economico De Mexicali, A.C. v. United States, 482 F.3d 1157, 1170 n. 4 (9th Cir. 2007).  
 22 "The Equal Protection Clause . . . is essentially a direction that all persons similarly situated  
 23 should be treated alike." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432,  
 24 439 (1985); Philips v. Perry, 106 F.3d 1420, 1424-1425 (9th Cir. 1997). "The requirements  
 25 for a selective-prosecution claim draw on ordinary equal protection standards." United  
 26

---

27           <sup>7</sup> The patients to which Plaintiffs refer are participants in the federal investigational  
 28 new drug (IND) program who receive drugs under clinical investigation in a controlled  
 study. See 21 U.S.C. § 355(b)-(d).

1 States v. Armstrong, 517 U.S. 456, 465 (1996). "To make a claim for selective  
 2 prosecution, Plaintiffs must establish (1) that similarly situated persons were not  
 3 prosecuted, and (2) that the defendants were motivated by a discriminatory purpose."  
 4 Lacey v. Maricopa Cty., 649 F.3d 1118, 1142 (9th Cir. 2011). Where no suspect class or  
 5 fundamental right is involved, plaintiff must demonstrate that "there is no rational basis for  
 6 the difference in treatment.' " Squaw Valley Dev. Co. v. Goldberg, 375 F.3d 936, 944 (9th  
 7 Cir. 2004) (internal quotations omitted).

8 Defendants contend that dismissal of this claim is appropriate because Plaintiffs  
 9 have failed to plead a prima facie equal protection clause claim. Defs.' Mot. at 18.  
 10 Plaintiffs have failed to oppose Defendants' motion to dismiss this claim to the extent that  
 11 the claim rests on the selective prosecution theory, which the Court construes as Plaintiffs'  
 12 absence of dispute with Defendants' arguments and an abandonment of the claim. See  
 13 Walsh, 471 F.3d at 1037. Moreover, dismissal of Plaintiffs' equal protection clause claim  
 14 premised on selective prosecution is appropriate because Plaintiffs have not alleged  
 15 sufficient facts demonstrating that Colorado medical marijuana or IND patients are  
 16 similarly situated to them,<sup>8</sup> or that any alleged disparity in enforcement of the CSA by  
 17 Defendants is attributable to any impermissible discriminatory motive.

18 In their opposition brief, Plaintiffs contend that Defendants' "briefing regarding  
 19 equal protection focuses primarily on one component identified in the complaint, relating to  
 20 selective prosecution[;]" however, "[e]qual protection is a broader concept." Pls.' Opp. at  
 21 18 n. 10. Plaintiffs further argue that "there is no rational basis to classify cannabis as  
 22 having no medical value" and "the CSA's prohibition against medical use in compliance  
 23 with State law is invidious discrimination as applied to patients generally that use cannabis  
 24 to resolve illnesses and health problems versus patients who use other drugs to do the same

---

25       <sup>8</sup> Unlike Plaintiffs, the IND participants have committed no crime because the CSA  
 26 expressly allows marijuana use in connection with research projects funded by the  
 27 government. 21 U.S.C. § 823(f); Oakland Cannabis, 532 U.S. at 490 (noting that the CSA  
 28 contains "but one express exception, and it is available . . . for Government-approved  
 research projects."). Hence, IND participants are not "similarly situated" because, unlike  
 Plaintiffs, their use of marijuana is expressly permitted by the CSA. See United States v.  
Wilson, 639 F.2d 500, 503 (9th Cir. 1981).

1 thing." Id. at 21. Plaintiffs have not pled such a claim in the operative complaint.  
 2 However, even assuming for the sake of argument that they have, their equal protection  
 3 clause challenge to the classification of marijuana as a Schedule I drug under the CSA is  
 4 foreclosed by Ninth Circuit precedent. See United States v. Miroyan, 577 F.2d 489, 495  
 5 (9th Cir. 1978); see also United States v. Fogarty, 692 F.2d 542, 547 (8th Cir. 1982) ("[W]e  
 6 conclude that [defendant] has not met his heavy burden of proving the irrationality of the  
 7 Schedule I classification of marijuana.").

8 Finally, to the extent that Plaintiffs' equal protection clause claim is premised on the  
 9 theory that the federal government lacks a rational basis to "actively restrict[] scientific  
 10 research into the medical value and use of cannabis to alleviate human suffering and pain,"  
 11 Am. Compl. ¶¶ 45-46, Defendants maintain it should be dismissed for lack of standing.  
 12 Defs.' Mot. at 21. Defendants argue that Plaintiffs have not alleged that they have been  
 13 injured by the government's conduct because there are no allegations that any Plaintiff  
 14 attempted to conduct research or was precluded from conducting it. Id. Defendants also  
 15 argue that the operative complaint is devoid of allegations suggesting a connection between  
 16 the alleged research restriction and the threatened federal enforcement of the CSA. Id. at  
 17 21-22. Plaintiffs do not dispute Defendants' contention that they lack standing in this  
 18 regard. The Court construes Plaintiffs non-opposition as Plaintiffs' absence of dispute with  
 19 Defendants' arguments and an abandonment of the claim, and therefore dismisses Plaintiffs'  
 20 claim in this regard. See Walsh, 471 F.3d at 1037. Additionally, the Court dismisses this  
 21 theory on the merits because Plaintiffs have failed to allege facts establishing that they have  
 22 standing to assert this claim. See, e.g., DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342  
 23 (2006) (to establish standing "[a] plaintiff must allege personal injury fairly traceable to the  
 24 defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.").

25 Accordingly, for the reasons stated above, Defendants' motion to dismiss Plaintiffs'  
 26 equal protection clause claim is GRANTED. Because Plaintiffs have not indicated that  
 27 they can cure the deficiencies identified by Defendants, this claim is DISMISSED with  
 28 prejudice.

1                   **6. Commerce Clause Claim**

2 Plaintiffs' sixth claim alleges that Defendants' attempt to regulate the intrastate  
 3 medical marijuana business violates the Commerce Clause. Am. Compl. ¶¶ 48-52.  
 4 Defendants contend that this claim is foreclosed by binding authority. Defs.' Mot. at 17.  
 5 The Court agrees. This claim was categorically rejected by the Supreme Court in Raich I,  
 6 which held that Congress has a rational basis to regulate the purely intrastate manufacture  
 7 and possession of marijuana. Raich I, 545 U.S. at 22. Plaintiffs have not opposed  
 8 Defendants' motion with respect to this claim, which the Court construes as an  
 9 abandonment of the claim. See Walsh, 471 F.3d at 1037. Accordingly, Defendants' motion  
 10 to dismiss Plaintiffs' Commerce Clause claim is GRANTED. Because amendment would  
 11 be futile, this claim is DISMISSED with prejudice.

12                  **C. Amended Motion for A TRO and Preliminary Injunction**

13                  In light of the Court's dismissal of all the claims alleged in the Amended Complaint  
 14 with prejudice, Plaintiffs' amended motion for a TRO and preliminary injunction is  
 15 DENIED as MOOT.

16                  **IV. CONCLUSION**

17                  For the reasons stated above, IT IS HEREBY ORDERED THAT:

18                  1. Defendants' motion to dismiss is GRANTED. The Amended Complaint is  
 19 DISMISSED with prejudice.

20                  2. Plaintiffs' amended motion for a TRO and preliminary injunction is DENIED  
 21 as MOOT.

22                  3. The Clerk shall close the file and terminate all pending matters.

23 Dated: 7/10/12

  
 24 SAUNDRA BROWN ARMSTRONG  
 United States District Judge

25  
 26  
 27  
 28